No. 85-1973

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF FOR THE RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Counsel for Respondent

JACK DONATELLI
Assistant Attorney General
Of Counsel

* Counsel of Record

Print ... 7)
BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
The Morrison Case	2
The Pope Case	4
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I.	
TO ASSURE ACCURATE AND REVIEWABLE JURY DETERMINATIONS OF WHETHER A WORK IS OBSCENE, IT IS NECESSARY TO PROVIDE CLEAR AND UNDERSTANDABLE STANDARDS DEFINING THE CONCEPT OF OBSCENITY, A RESULT BEST ACHIEVED WHEN ALL SUCH STANDARDS ARE EVALUATED ACCORDING TO CONTEMPORARY COMMUNITY STANDARDS	8
A. The Obscenity Determinations Of Prurient Interest, Patently Offensive, And Value Are Not Mere Questions Of Fact, But Mixed Questions Of Law And Fact Or Questions Of Constitutional Judgment	11
B. The "Average Person Applying Contemporary Community Standards" Requirement Of The *Miller* Test Assures An Objective Evaluation Of Whether Material Is Obscene	15

C. Application Of Contemporary Community Standards To All Three Elements Of The *Miller* Test Is Necessary To Promote Reliable Jury Determinations Of Obscenity 18

D. There Is No Danger That Jury Instructions Of The Type Used At Trial Will Result In Purely "Local" Obscenity Determinations 22

E. Too Much Variance In Obscenity Determinations Is Best Checked By Appellate Courts Who Have The Duty In First Amendment Cases To Conduct An Independent Constitutional Judgment 26

II.

PETITIONERS ARE NOT ENTITLED TO REVERSAL WHERE THEY WERE NOT MATERIALLY PREJUDICED BY THE JURY INSTRUCTION TO APPLY COMMUNITY STANDARDS TO THE "VALUE" DETERMINATION; NOR IS THE STATE OBSCENITY STATUTE FACIALLY INVALID SINCE IT CONTAINS NO LANGUAGE THAT WOULD MAKE IT OVERBROAD AND THERE IS NO SHOWING THAT OVERBREADTH WOULD BE SUBSTANTIAL 32

CONCLUSION 36

TABLE OF AUTHORITIES

PAGE

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 11, 26, 27, 28, 29, 30, 31

Ginzburg v. United States, 383 U.S. 463 (1966) 13, 14, 28

Glasser v. United States, 315 U.S. 60 (1942) .. 31

Hamling v. United States, 418 U.S. 87 (1974) .. *passim*

Jacobellis v. Ohio, 378 U.S. 184 (1964) 23

Jenkins v. Georgia, 418 U.S. 153 (1974) ... 14, 16, 26, 28

Kaplan v. California, 413 U.S. 115 (1973) 12

Kois v. Wisconsin, 408 U.S. 229 (1972) 8, 28

Manual Enterprises v. Day, 370 U.S. 478 (1962) 11, 26, 28

Marks v. United States, 430 U.S. 188 (1977) .. 32

Maryland v. Munson, 467 U.S. 947 (1984) 34

Memoirs, A Book v. Massachusetts, 383 U.S. 413 (1966) 12

Miller v. California, 413 U.S. 15 (1973) ..... *passim*

Miller v. Fenton, 475 U.S. ____, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) 30

Mishkin v. New York, 383 U.S. 502 (1966) 15, 17

New York v. Ferber, 458 U.S. 747 (1982) 34, 35

Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 14, 15, 20, 28, 33

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974) 35

Pinkus v. United States, 436 U.S. 293 (1978) 13, 14, 15, 16, 18

Redrup v. New York, 386 U.S. 767 (1967) 28

Roth v. United States, 354 U.S. 476 (1957) 8, 11, 12, 17, 25

Smith v. United States, 431 U.S. 291 (1977) .... *passim*

Splawn v. California, 431 U.S. 595 (1977) 14, 17

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982) 20, 23

United States v. Cutting, 538 F.2d 835 (9th Cir. 1976) 18, 23, 33

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 9, 20

United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976) 23

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 29

United States v. Thomas, 613 F.2d 787 (9th Cir. 1980) 23

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF FOR THE RESPONDENT

STATEMENT OF FACTS

The Respondent accepts the factual summary contained within Petitioners' brief (pages 3-7) as to the summary of historical events leading to Petitioners' convictions. They submit the following additional facts regarding the procedural history of the case in the Illinois courts.

The Morrison Case

In his pretrial motion to dismiss, Morrison claimed, *inter alia*, that unless judicially construed otherwise, the Illinois obscenity statute was unconstitutional under the First and Fourteenth Amendments for failing to require that the value determination be adjudged on an "objective" basis, rather than pursuant to community standards. (J.A. 6).

At the instruction conference, with regard to the standard of review, the court decided to give to the jury State instruction #12, over objection of petitioner. The instruction described the following standard:

> in determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole of the State of Illinois rather than by the people in any single city or town or region within the State.

(Morrison, R. 326, C46; J.A. 11).

Morrison objected that this standard of review did not contain the words "community standards" nor did it forbid the jurors to focus on their personal judgments. (Morrison, R. 218-219). Therefore, the court also gave to the jury petitioner's instruction #1, despite the State's objection that it was repetitive of State instruction #12. This instruction was that:

> you must not judge this material by your own personal standards, even if you are personally offended by the material; rather your verdict must be based on the evidence and testimony presented in this case, and your determination of what the community standards for the State of Illinois with respect to the obscenity or non-obscenity of the material are.

(Morrison, R. 326, C49; J.A. 12).

This was one of several instructions tendered by defendant that proposed a state-wide standard. (Morrison, R. C48-C67). Morrison tendered no instruction referring to or defining a nationwide standard. (Morrison, R. C48-C67). He did, however, tender several instructions, #3, #5, and #6, under which the "prurient interest" and "patently offensive" elements would be considered in terms of community standards, but the value element would be standardless. (Morrison, R. C53, C57, C59; J.A. 14).

At closing argument, the prosecution asked the jury to look at the magazines as ordinary adults would in the State of Illinois and to follow the obscenity test even if shocked by the magazines. (Morrison, R. 307, 316). Similarly, the petitioner asked the jury to disregard its personal feelings but determine the sense of the average adult in Illinois based on the evidence he presented of a state-wide poll indicating a growing tolerance for sexually explicit materials, as well as his evidence that these materials are available in communities throughout the State. (Morrison, R. 311-315).

In his post-trial motion, Morrison claimed that the court erred in giving State instruction #12 and in refusing his instruction #5, alleging that the jury was incorrectly instructed on the correct nature and application of the tripartite test of obscenity in violation of the First and Fourteenth Amendments. (J.A. 15).

On direct appeal, the Appellate Court of Illinois rejected Morrison's claim on the merits, saying only that this Court has never held that the value element may not be determined in accord with contemporary community standards.

The Pope Case

In his pretrial motion to dismiss Pope, like Morrison, claimed *inter alia* that, unless judicially construed otherwise, the Illinois obscenity statute was unconstitutional for failing to require that the value determination be adjudged on an "objective" basis, rather than pursuant to community standards, in violation of the First and Fourteenth Amendments. (J.A. 20).

At the instruction conference, with regard to the standard of review, the court refused the State's instruction #9 which stated that:

> in determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State.

(Pope, R. 308, 360).

Instead, the court gave to the jury petitioner's instruction #2 which stated that:

> in determining whether a thing is obscene, you must not judge it by your own personal standards, even if you are personally offended by the material. Your verdict must be based on the evidence and testimony in this case and your determination of community standards for the State of Illinois; that is, how the magazine would be viewed by ordinary adults in the whole state rather than by the people in any single city or town or region within the State.

(J.A. 25-26; Pope, R. 308).

This was one of several instructions tendered by petitioner that proposed a state-wide standard. (Pope, R. C65, C69). Pope tendered no instruction referring to or defining a nation-wide standard. (Pope, R. C64-C71). Nor did

he, unlike Morrison, tender instructions under which the "prurient interest" and "patently offensive" elements would be considered in terms of community standards, but the value element would be standardless. (Pope, R. C64-C71).

At closing argument, the prosecution urged the jury to rely on everyday principles of common sense and its day-to-day experiences in life, cautioning against personal feelings and asking the jury to resolve the obscenity determination as ordinary adults applying contemporary standards in the State of Illinois. (Pope, R. 318, 319-320, 323-325, 342). Similarly, the petitioner asked the jury to determine community standards as ordinary adults, mindful of all citizens throughout the State. (Pope, R. 328, 333). He emphasized that community standards apply to all three elements of the obscenity definition. (Pope, R. 336).

In his post-trial motion, Pope, unlike Morrison, did not claim that the court improperly instructed the jury on the correct nature and application of the contemporary community standards to the value element of obscenity in violation of the First and Fourteenth Amendments. (J.A. 27).

On direct appeal, the Appellate Court of Illinois rejected Pope's claim on the merits, again on the basis that this Court has never held that the value element may not be determined in accord with contemporary community standards. The State of Illinois made no contention in the Illinois Appellate Court that the claim was not properly preserved.

SUMMARY OF ARGUMENT

This Court should reject the mistaken notion that the third element of this Court's obscenity definition, whether a work has serious value, must somehow be measured by a different standard than the first and second elements of that definition.

Determinations that a work appeals to prurient interest, that it is patently offensive, and lacks serious literary or artistic value, are essentially determinations of fact, albeit facts with constitutional significance. These factual determinations as to each element of the obscenity definition coalesce to form the obscenity determination, and logically each element should be measured by a consistent standard. Historically, that standard has required the trier of fact to measure each element according to contemporary community standards.

By requiring the trier of fact to determine obscenity according to contemporary community standards this Court has fostered the central requirement of the First and Fourteenth Amendments, that obscenity be decided in an objective fashion. The trier of fact is thereby precluded from assessing whether a work is obscene to the unusually susceptible or sensitive viewer, and requires the fact-finder to apply a "reasonable person" standard. Thus, this Court does not evaluate jury determinations of obscenity according to the geographic size of the community whose standards are applied to measure whether a reasonable person would consider a work to be obscene. Rather, precedent requires that such community standards be evaluated under the "reasonable person" test.

Application of the "reasonable person" test according to contemporary community standards promotes accuracy in jury determinations of obscenity. By applying the same standards to each of the three elements of obscenity, jurors are able to utilize a consistent method of judgment based on a fixed point of reference, one which is readily understood and applied and which is subject to proof by extrinsic evidence. Further, application of contemporary community standards to the obscenity question also facilitates thorough appellate review by courts located within the specific community whose contemporary standards are being applied.

The Respondent's position poses no realistic threat that obscenity determinations will become so parochial as to chill legitimate expression. The precedent of this Court provides uniform, national precepts to govern how States may determine obscenity. Further, the required process of *de novo* appellate review for all determinations of obscenity substantially lessens the possibility of aberrant results. While there may be some discrepant results on the obscenity determination among various jurisdictions, these results do no violence to the First Amendment principles, but are the necessary product of a diverse union of states and the nature of the jury system itself. The First Amendment simply does not impose rigid requirements of uniformity among jurisdictions with varying *mores* and values.

Finally, petitioners' convictions are not entitled to reversal where they were not materially prejudiced by their jury instructions. Clearly, they had the benefit of the objective, average person test, not the unconstitutional subjective, personal test. Moreover, the Illinois statute is not facially invalid since it does not itself contain language defining what standard governs the value determination nor does it chill protected speech in any substantial way.

ARGUMENT

I.

TO ASSURE ACCURATE AND REVIEWABLE JURY DETERMINATIONS OF WHETHER A WORK IS OBSCENE, IT IS NECESSARY TO PROVIDE CLEAR AND UNDERSTANDABLE STANDARDS DEFINING THE CONCEPT OF OBSCENITY, A RESULT BEST ACHIEVED WHEN ALL SUCH STANDARDS ARE EVALUATED ACCORDING TO CONTEMPORARY COMMUNITY STANDARDS.

As the dissemination of sexually explicit pornography increased during recent decades, the States increasingly required guidance from this Court for their efforts to combat such obscene works without transgressing cherished First Amendment principles. The Court did much to provide such guidance with its decision in *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, a majority of the Court approved a three-point test for defining which type of expression may be condemned as "obscene":

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 230, quoting *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24.

Although *Miller* did indeed offer "basic guidelines for the trier of fact" by creation of the tripartite test quoted above, it did not completely define the standard of review to be utilized in deciding each segment of the test. The

decision expressly addressed the first two segments, holding that juries could decide whether a work appealed to the "prurient interest" and whether it did so in a "patently offensive way" by "applying contemporary community standards." *Id.* The majority discussed these elements as being "essentially questions of fact", similar to factual questions decided by juries in a wide range of litigation contexts. 413 U.S. at 30. In allowing such questions to be determined according to contemporary community standards, the Court observed "it would be unrealistic to require that the answer be based on some abstract formulation." *Id.*

Notwithstanding the undeniable need for a discernible standard for which jurors can evaluate allegedly obscene works, the *Miller* decision devoted substantially less attention to the third segment of the test: whether the work has serious literary, artistic, political or scientific value (the value element). No distinct effort was made to label the value element as a factual issue, nor did the *Miller* opinion expressly include value as an issue to be decided according to contemporary standards.

This omission was noted, but not examined or explained, in a subsequent obscenity decision of this Court, *Smith v. United States*, 431 U.S. 291, 301 (1977). Moreover, the omission itself, and *Smith*'s mention of it, had led some lower courts to conclude that the third element of the *Miller* test, the value element, is to be treated differently than segments one and two. *See, e.g., United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977). Petitioners have also seized upon this omission and now urge that value must not be determined according to contemporary community standards, as are prurient appeal and patent offensiveness. Rather, they proffer value as being amenable to an "objective" standard of review. (Pet. Br. at 28).

Respondent, the State of Illinois, urges this Court to reject this notion. Juries deciding the difficult questions attendant to an obscenity prosecution require, and are entitled to, a specific and ascertainable standard of review. Moreover, that standard should logically be uniform as to all three elements of the *Miller* test for obscenity, to enable consistency in jury evaluations. In deciding which standard should therefore apply, this Court should be mindful that the American criminal justice system "has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Miller*, 413 U.S. at 30.

Petitioners' proffer of an "objective" standard is illusory; it offers no standard at all. Indeed, this Court has stressed that all three of the *Miller* elements must be "objective", in that obscenity is a concept decided by reference to a "reasonable person" standard, not by reference to a particularly sensitive or susceptible person or group. *See, e.g.*, *Miller*, 413 U.S. at 33. Petitioners' efforts to create a different standard of review on the value element are contrary to this Court's recognition that the individual States should be free to treat obscene works in a fashion consistent with the *mores* of their own jurisdiction, and his proposals ultimately seek to further complicate the sophisticated jury determinations which must be made in every obscenity prosecution in order to honor the dictates of the First Amendment. This result is certainly undesirable, and it is not required in order to effectuate the constitutional commands of free speech and expression.

A. The Obscenity Determinations Of Prurient Interest, Patently Offensive, And Value Are Not Mere Questions Of Fact, But Mixed Questions Of Law And Fact Or Questions Of Constitutional Judgment.

In an obscenity action, the determination of a material's value rests with the trier of fact in the same manner as the determination of a material's "prurient interest" and "patent offensiveness." *Miller*, 413 U.S. at 24. And yet these three determinations are not merely the kind of pure historical fact questions traditionally decided by triers of fact. Rather, they require the trier of fact to make a judgment that is dispositive of the ultimate constitutional question of obscenity.

Thus, they are recognized, not really as questions of fact, but questions of constitutional judgment of the most sensitive and delicate kind. *Roth v. United States*, 354 U.S. 476, 497-498 (1957) (Harlan, J., concurring and dissenting opinion). They have been described as the kinds of mixed questions of law and fact that reviewing courts can resolve just as competently as triers of fact, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 517, n.1 (1984) (Rehnquist, J., joined by O'Connor, J., dissenting opinion). They are "factual matters entangled in a constitutional claim." *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962).

Therefore, while the jury's role in the obscenity determination is important, the stakes, in terms of impact on future cases and future conduct, are too great to entrust them finally to the judgment of the trier of fact. *Bose*, 466 U.S. at 501, n.17. The jury's role has thus been tempered by the standard of review described as the "average person in the community" and by the power of the reviewing court to conduct independent review. *Miller*, 413 U.S. at 25.

Logically, each of the three obscenity determinations should be made by the trier of fact in the same manner. This Court has consistently held that obscenity is to be determined according to the average person applying contemporary community standards. *Smith v. United States*, 431 U.S. 291, 304 (1977); *Miller v. California*, 413 U.S. 15, 37 (1973); *Hamling v. United States*, 418 U.S. 87 (1974); *Roth v. United States*, 354 U.S. 476 (1957); *Kaplan v. California*, 413 U.S. 115, 121 (1973). This principle has never limited community standards to specific elements of the definition but intends its application to the entirety of the definition.

This intention was expressed in *Memoirs, A Book v. Massachusetts*, 383 U.S. 413 (1966) where this Court first fashioned the tripartite test, consisting of the first "prurient interest" element, the second "patently offensive" element, and a third, more stringent "utterly without value" element. Obscenity itself was defined in terms of the average person applying contemporary community standards and "under this definition . . . [the] three elements must coalesce." *Memoirs*, 383 U.S. at 418. If obscenity itself is a community determination, each of the three elements which "coalesce" to form its definition must also be judged by community standards.

This rule could not be questioned today except for the ambiguity contained in *Miller* and noted in *Smith*. In neglecting to discuss the value element—which it had since reformulated to "serious literary, artistic, political, or scientific value"—in terms of community standards, *Miller* and *Smith* planted the seed for petitioners' argument that this element is a unique one in the obscenity determination, not subject to community standards.

However, neither *Miller* nor *Smith* suggested any deviation from the rule that obscenity is to be determined by

applying community standards. These cases never suggested that the obscenity question was a hybrid composed of two parts community standards and a third part something else. On the contrary, in *Miller* the Court iterated the rule that obscenity itself was a community determination, and then refined it, laying to rest the idea that the "community" had to be the "nation." *Miller*, 413 U.S. at 37. In *Smith*, the Court remained steadfast to the rule, emphasizing that "the Court has never varied from the *Roth* position that the community as a whole should be the judge of obscenity." *Smith*, 431 U.S. at 300-301, n.6, and at 304.

Nor did *Miller* or *Smith* suggest that the value element was an exceptional question for the jury to answer in making the obscenity determination. The third value element was included as one question, along with the "prurient interest" and "patently offensive" questions, that was to be presented to and resolved by the trier of fact. *Miller*, 413 U.S. at 24. Since contemporary community standards take on meaning with reference to the underlying questions of fact that must be resolved by the trier, *Smith*, 431 U.S. at 300, they must necessarily take on meaning as to the value fact question.

Certainly the value element is just as much a fact question as the "prurient interest" and "patently offensive" elements. It is equally amenable to proof by way of evidence. For instance, this Court has noted that evidence of "pandering" is relevant to all three elements, including the question whether expression has serious literary, artistic, political, or scientific value. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. *Pinkus v. United States*, 436 U.S. 293, 303 (1978); *Ginzburg v. United States*, 383 U.S. 463, 467 (1966). If there

is any claim that material has serious value, the question of whether it was pandered—deliberately promoted by the disseminator as erotically arousing—is relevant to whether that claim is pretense or reality, that is, whether it was the basis why the material was traded in the marketplace or whether it is a spurious claim for litigation purposes. *Ginzburg*, 383 U.S. at 470; *Splawn v. California*, 431 U.S. 595, 598-599 (1977). Evidence of whether the publisher emphasized titillation or saving intellectual content can help the trier of fact determine whether the material has any serious value. *Ginzburg*, 383 U.S. at 470; *Splawn*, 431 U.S. at 598-599; *Memoirs*, 383 U.S. at 420; and *see Pinkus*, 436 U.S. at 303; *Hamling*, 418 U.S. at 598.

The existence of awards and citations may also be relevant to the value element. In *Jenkins v. Georgia*, 418 U.S. 153, 158, 161 (1974), this Court, after considering evidence that the movie "Carnal Knowledge" appeared on many "Ten Bests" lists for 1971, that it received favorable reviews, and that an actress received an Academy Award nomination for her performance in the picture, concluded that the "patently offensive" element was not met.

But this same evidence is also relevant to the trier of fact's assessment of a material's serious value. For instance, in *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980), the Fifth Circuit interpreted *Jenkins* as indicating that these awards and citations also showed that the movie had serious value and that similar distinctions applicable to magazines such as "Playboy" and "Penthouse" could indicate serious value as well. Thus, it was relevant that: "Penthouse" and its editor had received awards from Columbia University School of Journalism, the Overseas Press Club, and Brandeis University; "Penthouse" had a very large annual worldwide circulation; "Playboy" had a large monthly circulation, had been

published since 1953, and its subscribers included 950 libraries in the United States; and both magazines attract advertising by national concerns. This evidence could support the contention that the materials possessed serious value. *Penthouse Intern.*, 610 F.2d at 1372.

Thus, the decision by the State of Illinois to instruct its juries that obscenity must be determined pursuant to each member's perception of the average person applying contemporary community standards, is made in reliance on the decisions of this Court. These same decisions support the decision to instruct juries that community standards apply to each of the three factual questions that "coalesce" to form the obscenity definition. It is only logical that the value determination should be made in the same manner as the "prurient interest" and "patently offensive" determinations.

B. The "Average Person Applying Contemporary Community Standards" Requirement Of The *Miller* Test Assures An Objective Evaluation Of Whether Material Is Obscene.

The Respondent's position herein is premised on this Court's explanation of what purpose the community standard serves. The standard of the "community" was developed to assure that the obscenity judgment be made on the basis of the average person applying contemporary standards. *Hamling*, 418 U.S. at 107; *Pinkus v. United States*, 436 U.S. 293, 300 (1978). The concept originated in *Roth* to serve the essentially negative purpose of expressing the Court's rejection of a test focusing on susceptible, rather than average, persons. *Mishkin v. New York*, 383 U.S. 502, 508-509 (1966). Its principle function is to protect First Amendment values by assuring that a trier of fact will not indulge his own personal and

private views in resolving the obscenity definition. *Pinkus*, 436 U.S. at 300; *Smith*, 431 U.S. at 305; *Hamling*, 418 U.S. at 107. Rather, under the standard of the community, the juror must draw on his knowledge of the characteristics and differing attitudes in the community or vicinage from which he comes, in deciding what conclusion the average person applying contemporary community standards would reach. *Hamling*, 418 U.S. at 104. This standard is intended to function much the same as the "reasonable man" standard used for generations in other contexts. *Pinkus*, 436 U.S. at 300; *Smith*, 431 U.S. at 302; *Hamling*, 418 U.S. at 104-105. These standards of the "reasonable man" and the "community" are very similar in that neither lends itself to precise definition. *Smith*, 431 U.S. at 308.

Thus, the size of the average person's community is not important. No precise geographic area of the "community" has ever been required. *Hamling*, 418 U.S. at 105. A State may direct the jury to apply community standards without specifying what that community is, as Georgia did in *Jenkins*, 415 U.S. at 157. But if the State wants to specify a community, it could be as small as the area from which the jury is drawn, *Smith*, 431 U.S. at 303; *Hamling*, 418 U.S. at 105; it could be statewide like California's, *Miller*, 413 U.S. 31; or it could be larger than the jury's general vicinage; *Hamling*, 418 U.S. at 105-106. The trial court has discretion to allow evidence of community standards outside the vicinage of this would assist the jury's determination. *Hamling*, 418 U.S. at 106. Moreover, this Court has left open the question that the State could make the standard of review a national community. It explained that *Miller* did not forbid a national community standard, but only said that the States could not be compelled to adopt a national standard. *Smith*, 431 U.S. at 304, n.11.

Therefore, it is not the concern of federal reviewing courts to wrangle over the State's geographic delineation of the average person standard since this is not a constitutional matter. This Court has explained that, unlike its broad authority to review instructions in obscenity prosecutions under federal statutes, federal reviewing courts can upset state court convictions by reason of instructions given in the course of a trial only if the instruction renders the subsequent conviction violative of the United States Constitution. *Splawn*, 431 U.S. at 599. In the obscenity context, the Constitution is violated only if there is an indication that the trier of fact failed to apply "average" standards.

For instance, in *Hamling*, the trial court instructed the jury in a federal obscenity prosecution to judge the obscenity *vel non* of a brochure by reference to the contemporary community standards generally held throughout this country. *Hamling*, 418 U.S. at 103. This Court determined that the reference to the community standards of the nation as a whole delineated a wider geographical area than was warranted under *Miller*; but defendant was not materially prejudiced since the reason the Constitution requires application of contemporary community standards is to assure that the material is judged, neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. *Hamling*, 418 U.S. at 107; *Miller*, 413 U.S. at 33; *Mishkin*, 383 U.S. at 508-509; *Roth*, 354 U.S. at 489. The trial court's instruction, including its reference to the nation as a whole, "undoubtedly accomplished this purpose." *Hamling*, 418 U.S. at 107.

This same "average" standard was accomplished in a federal obscenity action in *Pinkus*, even though the jury was told that, in arriving at the standard of the average

person in the community, it must include the sensitive and the insensitive. *Pinkus*, 436 U.S. at 299. This Court said that the trier may not indulge a sensitive or insensitive viewpoint, but he need not ignore it in assessing an average viewpoint. *Pinkus*, 436 U.S. at 300.

Clearly, if a trier of fact receives the instruction to sit as an average person to determine the collective view of the community as best as he can, and if, on the record, there is no indication that the trier was influenced, either by the judge or by counsel during argument, to focus on sensitive persons or groups or on his private views, First Amendment values are safeguarded. *Hamling* and *Pinkus* show that these values are jeopardized only where the record indicates that the jury applied a specialized test that might differ, to the defendant's disadvantage, from a generalized "average person in the community" test. *See also United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976).

Therefore, it is the State's constitutional task to ensure that the jurors do not approach the obscenity question with their own personal predilictions or sensitive viewpoints but sit as average persons applying contemporary community standards. The States are free to decide how to best to assure this result.

C. Application Of Contemporary Community Standards To All Three Elements Of The *Miller* Test Is Necessary To Promote Reliable Jury Determinations Of Obscenity.

As previously discussed, the *Miller* test contemplates that what is essentially a question of fact (whether a work has serious value) will be decided by juries using a reasonable-person analysis based upon contemporary community standards. Petitioners attempt to dispute these proposi-

tions by urging that an "objective" standard must govern the value element, even though they never explain precisely what that standard is or how it is different from the standard of any particular community. Petitioners decry the possibility that "jurors [will] receive mixed signals about the role community standards plays (sic) in the definition of obscenity" (Pet. Br. at 27) even as they urge that these signals be mixed even further by inclusion of a second standard of review. Petitioners express concern that sexually explicit materials will be suppressed by "an asserted majority of citizens" (*id.*), thereby ignoring this Court's oft-stated view that individual States are entitled to combat pornography in a fashion reflective of local community standards, standards which obviously must derive from the majority views as to what types of sexually explicit works are deemed objectionable.

What Petitioners seemingly fail to appreciate is that this Court intends to effectuate First Amendment freedoms, not by specifying the sheer size of the geographic community from which community standards are drawn, but by the requirement that all community standards be assessed on an objective, "reasonable person" basis. (See section B, *supra*). Significantly, this Court has always declined invitations to require "national standards" for evaluating obscenity, primarily because of legitimate doubts as to whether such a standard could ever be formulated so as to aid the trier of fact. *Miller*, 413 U.S. at 32; *Hamling*, 418 U.S. at 105.

Therefore, while it may well be true that any differences between a local community standard of value and a purported national standard are "gossamer" (*Hamling*, 418 U.S. at 109) there is still a vital function to be served by instructing jurors that they should evaluate the serious value of a work by using contemporary local community

standards. That function, of course, is to provide the juror with a known and ascertainable frame of reference by which the serious value of a work may be measured. Local community standards permit the individual juror to fix a point of reference in making this judgment, with the substantial collateral benefit of facilitating the task of state appellate courts which must review such verdicts.

Indeed, the Respondent is unable to define what exactly is meant by an "objective standard" if it differs significantly from the standards applied to the first and second parts of the *Miller* test. Petitioners carefully refrain from terming it a "national" standard, they obviously reject the idea that it is a local community standard, and neither party desires a standard premised upon the personal, subjective attitudes of a given juror. It would appear that Petitioners suggest merely a standardless value determination.

In fact, the authority relied on by Petitioners appears to suggest just that. While this authority theorizes that in applying the first two elements the trier of fact must utilize contemporary community standards, but in applying the third element the trier of fact may not rely on contemporary community standards, no case cited by Petitioners articulates what standard should govern the third value element. *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982); *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977); *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980). The cases purport to rely on *Smith*, but *Smith* never went so far as to hold that the value determination—unlike the other two determinations—should be standardless. *Smith*, 431 U.S. at 301. Rather, *Smith* left the question unaddressed, stating only that:

> Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards.

Smith, 431 U.S. at 301.

The State of Illinois maintains that the value determination should not be standardless. Such an interpretation would assign to the trier of fact a very confusing task: a juror would be told to sit as a local average person, drawing on his own experience of everyday life in the community, in assessing the first two elements of obscenity, but when he assesses the third element, he would not be told that he may sit as a local average person, drawing on his own experience of everyday life in the community. Under the standardless approach, he has no idea *how* he must sit in determining the value of expression. Ultimately, the juror can do no more than resort to his knowledge and experience of life. In other words, he will bring to the value determination the same sense that he brings to "prurient interest" and "patently offensive" elements; as a practical matter, the juror must be

> entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of law.

Smith, 431 U.S. at 302.

In the final analysis, Respondent admits of the possibility that sexually explicit expressions in a given work are wholly deserving of First Amendment protection, that the inherent value of a work removes it from the ambit of what is obscene. Illinois is not bent on suppressing "vigorous and robust sexual debate" (Pet. Br. at 24), although it entertains grave doubt as to whether magazines

entitled "Anal Animal" or "Fuck Around" are contributors to any meaningful or legitimate social discourse in the realm of human sexuality. Respondent seeks only its sovereign right to permit the citizens of Illinois to act as objective arbiters of contemporary community standards, and to permit the appellate courts of Illinois to review obscenity determinations with the benefit of their own perspective of those same standards. Importation of an amorphous, undefined "objective" standard as to the serious value of a particular work entirely defeats those sovereign rights, replacing them with standardless analyses which can only detract from the reliability of obscenity convictions secured in any given State.

D. There is No Danger That Jury Instructions Of The Type Used At Trial Will Result In Purely "Local" Obscenity Determinations.

This Court has no need to save First Amendment values from local parochialism. It fashioned the test that protects First Amendment values in *Miller*. Everywhere in this nation, a trier of fact in an obscenity action must adhere to the fixed, uniform, national *Miller* definition in determining whether expression is obscene. In so doing, the juror is entitled, as in any case, to draw on his experience in everyday life and reach the common conscience of the community. This is consistent with First Amendment values.

People in different States vary in their tastes and attitudes. *Miller*, 413 U.S. at 33. The First Amendment does not operate to strangle this diversity with the absolutism of imposed uniformity. *Miller*, 413 U.S. at 33. It does not require that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. *Miller*, 413 U.S. at 32. It does not ordain a national sameness.

Thus, this Court adopted Chief Justice Warren's position that, while the "community" approach may at times result in material being proscribed as obscene in one community but not in another, the communities throughout the Nation are in fact diverse and the freedoms of the communities to experiment and choose for themselves within our society are to be reconciled with the rights of individuals. *Miller*, 413 U.S. at 32; *Hamling*, 418 U.S. at 107; *Jacobellis v. Ohio*, 378 U.S. 184, 200-201 (1964) (Warren, J., dissenting opinion).

On this authority, the intermediary reviewing courts have described obscenity as "contextual," in that differences in the contemporary standards of different communities create different conclusions as to obscenity. *United States v. Thomas*, 613 F.2d 787, 791 (9th Cir. 1980). The community standards test results in application of local attitudes, *United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976), assures a degree of diversity, *United States v. Linetsky*, 533 F.2d 192, 201 (5th Cir. 1976), and reflects the various degrees of tolerance throughout the country. *United States v. Bagnell*, 679 F.2d 826, 836 (11th Cir. 1982).

Clearly, the First Amendment contemplates a certain amount of local variety in determining what kind of expression is constitutionally unprotected. It has no goal to homogenize expression in a Nation as large and diverse as ours. But even if that were a worthy goal under the First Amendment, application of a national standard or any type of "objective" standard to the third value element would do little to achieve it.

For instance, in *Miller*, this Court rejected the argument, raised again by Petitioners now, that a local community standard would run the risk of preventing dissemination of materials in some places because sellers would

be unwilling to risk criminal conviction by testing variations in standards from place to place. *Miller*, 413 U.S. at 32, n.13. It saw that the argument could easily be turned around—a national standard would run the risk that materials found acceptable in some places would nonetheless be unavailable in these places under a national average person criterion. *Miller*, 413 U.S. at 32, n.13. In terms of any danger to free expression, the potential for suppression of protected speech is at least as great in the application of a single nationwide standard as in allowing dissemination in accordance with local tastes. *Miller*, 413 U.S. at 32, n.13. Efforts by a State to establish a more liberal, relaxed policy for sexually explicit communication than the nation as a whole could be thwarted. In the States that do not proscribe obscenity, a national standard could inspire uncertainty in publishers or disseminators. If this should result in substantial chilling, the people in these more relaxed communities where obscenity is not proscribed will nonetheless be "protected" from expression determined obscene in far away communities on the premise that all average citizens, not just those in the far away community, would find certain expression obscene.

Moreover, neither a national standard nor a standardless determination would itself eliminate the discrepant determinations that could discourage protected speech. For instance, discrepant determinations are an unavoidable product of the jury system, even on like facts and law. In the marginal obscenity cases, it is often difficult to determine the side of the line on which a particular fact situation falls. *Hamling*, 418 U.S. at 114-11[illegible]; *Miller*, 413 U.S. at 27, n.10. But the mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. *Hamling*, 418 U.S. at 101;

Miller, 413 U.S. at 26, n.9. The common experience that different juries may reach different results is one of the consequences we accept under our jury system. *Hamling*, 418 U.S. at 101; *Miller*, 413 U.S. at 26, n.9; *Roth*, 354 U.S. at 492, n.30.

Nonetheless, in resolving the sensitive questions in this area of law, we continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and individuals. *Miller*, 413 U.S. at 26. One of these other protective features is *voir dire*, which provides the chance to glimpse the "parochial" nature of potential jurors. For instance, in the present cases, veniremen were asked about their contacts outside their local community, where else they had lived, where they had traveled, their contact with out-of-town newspapers, national publications, and cable television, their military and educational background, and their affiliation with any religious or social groups that have taken a public stance on obscenity. (Pope, R. 2-172; Morrison, R. 16-77). In this way, citizens who could be fair and impartial because they have the experience to sit as "average" persons, rather than as "sheltered" or parochial persons, could be discerned and chosen.

Additionally, localized obscenity determinations may inevitably surface under the nature of our criminal justice system whereby some States have no obscenity legislation and others subject disseminators to various degrees of criminal liability. *See Hamling*, 418 U.S. at 106. While this must certainly affect the decision of whether or not to disseminate possibly protected expression in a given area, again, it does not mean that constitutional rights are abridged; this again is one of the consequences we

accept under our criminal justice system which is safeguarded by the protective features just discussed.

Thus, the community standard will generate some measure of local, parochial determinations that might chill expression possibly protected in other areas, but the First Amendment tolerates this. In any event, danger to free expression is just as great under a national standard which could preclude expression from areas that would tolerate it under a community standard. But neither standard can eliminate disparate determinations which might chill protected expression where this variance inheres in our jury system and our system of justice.

E. Too Much Variance In Obscenity Determinations Is Best Checked By Appellate Courts Who Have The Duty In First Amendment Cases To Conduct An Independent Constitutional Judgment.

This Court has adhered to the rule that First Amendment values are protected, not just by confining State offenses within the tripartite limitations, but by the ultimate power of the reviewing court to conduct independent review of the constitutional claim when necessary. *Miller*, 413 U.S. at 25; *Jenkins*, 418 U.S. at 161; *Manual Enterprises*, 370 U.S. at 438. Interestingly, the utility of this rule in an obscenity action was best and amply explained by this Court in a defamation action, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

In *Bose*, this Court scrutinized the obligation of the reviewing court in all First Amendment cases to make an independent *de novo* examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. This constitutional obligation of independent review is one that may not be delegated to the trier of fact. It is in-

voked in every case involving speech that might fall outside constitutional protection: libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *Bose*, 466 U.S. at 499-504.

Bose explained that in each of these areas, the reviewing judges have defined the constitutional limits and character of the unprotected expression by evaluating the special facts that in their judgment have constitutional significance. Then in each of these cases, the reviewing judges have conducted independent review of the record; first, to be sure that the speech in question actually falls within the definition, and second, to keep the definition confined within narrow limits so that protected expression is not inhibited.

Providing triers of fact with a general description of the type of communication whose content is unworthy of protection cannot, in and of itself, serve to narrow the category nor can it eliminate the danger that decisions by triers of fact may inhibit protected expression. The requirement of viewpoint neutrality that underlies the First Amendment imposes a special responsibility on judges whenever it is claimed that expression is unprotected. *Bose*, 466 U.S. at 505. Therefore, when it comes to certain factual questions in the area of the First Amendment, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact. *Bose*, 466 U.S. at 501, n.17.

In each of the First Amendment areas, judges have traditionally exercised independent judgment. It has never been the case that a jury finding of obscenity *vel non* is insulated from review so long as the jury was properly instructed and there is some evidence to support its finding. Rather, by adhering to independent *de novo* review, the reviewing court fulfills a judicial function that is "law

in its purest form under our common law heritage," necessary to preserve the precious liberties established and ordained by the Constitution. *Bose*, 466 U.S. at 510.

Independent *de novo* review is the best and most potent check against "parochial" jury determinations. Reviewing courts, including this Court, have depended on it to champion First Amendment values. It worked in *Jenkins* where this Court viewed for itself the motion picture "Carnal Knowledge" and determined, contrary to the jury finding, that the film did not depict sexual conduct in a "patently offensive" way. *Jenkins*, 418 U.S. at 159-161. It worked in *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972), where this Court viewed for itself an underground newspaper and determined, contrary to the trier of fact's finding, that the newspaper did not appeal to a dominant theme of "prurient interest." (*See also Penthouse Intern.*, 610 F.2d at 1364). It worked in *Manual Enterprises*, where this Court viewed for itself certain magazines and photographs and determined, contrary to the trier of fact's finding, that they were not "patently offensive." *Manual Enterprises*, 370 U.S. at 482. And finally, it worked in *Ginzburg*, where this Court viewed for itself the book "Fanny Hill" and determined, contrary to the trial judge's finding, that the book was not obscene. *Ginzburg*, 383 U.S. at 470.

Certainly this Court has no desire to return to the discredited system followed after *Redrup v. New York*, 386 U.S. 767 (1967), requiring the Court to accept each obscenity case for an *ad hoc* determination of whether a work was protected by the First Amendment. But the examples listed above do illustrate that appellate courts of review are competent to assess the First Amendment values of a given work, notwithstanding lower court jury verdicts on the same issue. Further, Respondent stresses again

that appellate review is facilitated when a state court of review is required to assess whether a work offends state community standards. Moreover, as to the value element of the *Miller* test, it should be noted that this Court has characterized this element as being particularly amenable to appellate review. *Smith*, 431 U.S. at 305. In any event, *Ginzburg* demonstrated that review of the "ultimate" question of obscenity may be based upon all three *Miller* elements. *Ginzburg*, 383 U.S. at 470.

Nonetheless, petitioners suggest that the rule of independent review is limited. Their premise is that application of local standards to the first two elements necessarily restricts a reviewing court's ability to review these findings because of its unfamiliarity with standards in that particular community. Meaningful review is available only for the third element, and then only if it is not tied to community standards. In support, petitioners rely on a gradational system of review, developed by the Ninth Circuit in purported reliance of *Bose*, whereby the first element is subject to limited review, the second element slightly broader review, and the third element more extensive review. *United States v. Merrill*, 746 F.2d 458, 463-464 (9th Cir. 1984).

But *Bose* never contrived such a system; in fact, the whole point of *Bose* was to reject such a system. *Bose* held that the standard set out in Rule 52(a) of the Federal Rules of Civil Procedure, under which findings of fact may not be set aside unless clearly erroneous, could not, in First Amendment cases, suspend an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact and law. *Bose*, 466 U.S. at 501. Regardless of the jury's function, the constitutional problem in the last analysis is a judgment which appellate courts must make for themselves. *Bose*, 466 U.S. at 506, n.25.

This rule rests on a crucial distinction ignored by petitioners and by the Ninth Circuit in *Merrill*. When the issue involves the credibility of witnesses and turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Miller v. Fenton*, 475 U.S. ____, 106 S.Ct. 445, 452, 88 L.Ed.2d 405, 414 (1985). But where the relevant legal principles can be given meaning only through its application to the particular circumstances of the case, this Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. *Miller*, 475 U.S. ____, 106 S.Ct. at 452, 88 L.Ed.2d at 413. Obviously, use of a gradational system of review in obscenity cases, providing deference to "factual" findings as to prurience and patent offensiveness that are dispositive of the ultimate legal question, conflicts with *Bose*'s adherence to independent, *de novo* appellate review. All three of the obscenity elements are equally amenable to *de novo* appellate consideration. As Justice Rehnquist, joined by Justice O'Connor, explained in *Bose*, appellate courts are perhaps just as competent as triers of fact to make determinations about whether material appeals to "prurient interests," whether it depicts sexual conduct in a "patently offensive" way, and whether the material lacks serious artistic value. *Bose*, 466 U.S. at 517, n.1 (dissenting opinion).

Nor has this Court ever employed anything like gradational review. It is clear that in *Jenkins*, *Kois*, *Manual Enterprises*, and *Ginzburg*, this Court employed *de novo* review, not review deferential to the fact-finder's conclusions as to the elements of prurience and patent offensiveness. *Hamling* further demonstrates the difference be-

tween independent review and general appellate review: the Court first held that the jury determination of obscenity was supported by the evidence and consistent with the applicable constitutional standard, and then reviewed the sufficiency of the evidence arguments regarding other issues with proper deference afforded under the test of *Glasser v. United States*, 315 U.S. 60 (1942). *See Bose*, 466 U.S. at 506, n.26.

Clearly, the employment of community standards by the trier of fact to the first and second elements in no way divests this Court of its constitutional obligation to conduct *de novo*, independent review of these First Amendment questions. The petitioners, as well as the Ninth Circuit, misapprehended the interplay between the jury's role to bring a sense of the "average person" to the fact of obscenity and the reviewing court's role to re-evaluate the evidence under the law, mindful of First Amendment values.

Indeed, this misapprehension is at the core of petitioners' contention that the third value element must remain free of community standards. Because petitioners mistakenly discern that appellate review as limited, rather than independent, they fail to understand that reviewing courts ultimately rescue expression from entirely parochial determinations. Alleged efforts by the States or the Justice Department to harness expression to the tenor of the times can only fail. In the end, as this Court has ably demonstrated in its rulings, the courts of review are the protectors of expression from suppression by majority rule.

II.

PETITIONERS ARE NOT ENTITLED TO REVERSAL WHERE THEY WERE NOT MATERIALLY PREJUDICED BY THE JURY INSTRUCTION TO APPLY COMMUNITY STANDARDS TO THE "VALUE" DETERMINATION; NOR IS THE STATE OBSCENITY STATUTE FACIALLY INVALID SINCE IT CONTAINS NO LANGUAGE THAT WOULD MAKE IT OVERBROAD AND THERE IS NO SHOWING THAT OVERBREADTH WOULD BE SUBSTANTIAL.

Petitioners claim that, if contemporary community standards do not govern the value determination, they are entitled to reversal so that a jury can address that question unrestrained by community standards. They rely on *Marks v. United States*, 430 U.S. 188 (1977) where the jury had been furnished an incorrect element of the offense and this Court remanded the cause so the jury could resolve it in the first instance.

However, this cause is not like *Marks* because petitioners did not receive an instruction incorrectly stating the elements of the offense. Rather, the issue turns on an instruction as to the jury's standard in review in determining the elements of the offense. Therefore, *Hamling v. United States*, 418 U.S. 87 (1974), not *Marks*, is controlling.

Hamling explained that, in an obscenity action, reversal is not necessary, even where the jury instruction as to the standard of review is incorrect, where defendants are not materially prejudiced by the incorrect instruction. In determining material prejudice, the principal concern is that the material not be judged on the basis of each juror's personal opinion nor by its effect on a particularly sensitive or insensitive person. *Hamling*, 418 U.S. at 107. The standard of the "community," whether it be local

or national, accomplishes this purpose. *Hamling*, 418 U.S. at 107.

It is true that *Hamling* presented an "unusual posture" in that the challenged national standard instruction was proper at the time it was given by the trial court. *Hamling*, 418 U.S. at 108. But this case presents a similar posture since this Court has never held that the States may not instruct juries to apply the standard of the community in assessing the value of certain expression. Thus, petitioners must show material prejudice before being entitled to reversal, however, they cannot on this record. The juries in each case were told, both at instruction and at closing arguments, to sit as "average" people and not to indulge their personal tastes or the tastes of particularly sensitive or insensitive persons. (Pope, R. 308, 318, 319-320, 323-325, 328, 333, 336, 342, 360; R. C65, C69; J.A. 25-26); (Morrison, R. 218-219, 307, 311-316, 326; R. C46, C49; J.A. 11, 12).

Furthermore, there is no evidence in this record to suggest that a local community standard was somehow different from a national standard or some other kind of "objective" standard. Nor is there a basis for supposing that the jury would have assumed the local standard might be either stricter or more tolerant than another standard. *See United States v. Cutting*, 538 U.S. 835 (9th Cir. 1986).

Finally, it was never part of the defense in either cause that the materials in question had saving intellectual content to rescue them from prohibition. There is no evidence of awards, citations or favorable reviews, no evidence of a public circulation, no evidence of advertising by national concerns, and no evidence that they might be found in a public place such as a supermarket or library. *See Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980).

Where petitioners have not argued that these materials have any kind of value, and where they have failed to show how an "average person" in the State of Illinois would be more tolerant or less tolerant toward these particular materials than other "average persons," petitioners cannot show they are materially prejudiced by the community standard instruction as to the value element. Without material prejudice, petitioners are not entitled to reversal.

Moreover, the Illinois obscenity statute is not facially invalid where it can be constitutionally applied even if community standards are an inappropriate standard for determining value. Petitioners' own authority recognizes that, before a statute will be invalidated on its face, the alleged overbreadth involved must be substantial. *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Maryland v. Munson*, 467 U.S. 947, 964-965 (1984). Because there are wide-reaching effects on striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, this Court recognizes that the overbreadth doctrine is strong medicine, employed with hesitation and only as a last resort. *Ferber*, 458 U.S. at 769. Laws that are too broadly worded may deter protected speech to some unknown extent, but there comes a point where that effect, at best a prediction, cannot with confidence justify invalidating a statute on its face, thereby prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Ferber*, 458 U.S. at 770.

The premise that a law will not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications, is as applicable to the publication of books and films as it is to other areas of conduct-plus-speech. *Ferber*, 458 U.S. at 771-772. Thus, the Court's

practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Ferber*, 458 U.S. at 772.

The Illinois statute in effect at the time of petitioners' acts itself stated that "obscenity shall be judged with reference to ordinary adults." Ill. Rev. Stat. 1983, ch. 38, §11-20. It did not tie this standard to the value determination nor did it geographically delimit a community as the "State of Illinois." This delimitation has been established by case law. *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974). Thus, even if this Court were to hold that value must be determined outside of contemporary community standards, nothing on the face of the statute prevents it from being applied in accordance with that holding.

Moreover, there has been no showing that the standard of the State community is significantly different from the "objective" or national standard. Where the difference is negligible and at best a prediction, it can hardly be said that the statute reaches any number of impermissible applications, let alone a substantial number. It is only surmise that protected speech was possibly deterred because disseminators thought that value was determined by community standards rather than an "objective" standard, whatever that might be. This is clear because, again, petitioners have not adduced evidence that a local community standard was, in this case, different from any other standard or that the jury assumed the local standard to be stricter or more tolerant than another standard.

Where the statute itself contains no language that would make it overbroad and where there is no showing that any possible overbreadth would be substantial, the statute may not be invalidated on its face.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to affirm the decision of the Illinois Appellate Court, Second District, and uphold both the Illinois obscenity statute and the petitioners' convictions.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA J. STEWART
Solicitor General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent

JACK DONATELLI
Assistant Attorney General
Of Counsel

* Counsel of Record

January 9, 1987